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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MARTIN L. STERN  
DIRECT DIAL: (202) 662-8468

November 7, 1997

Mr. William Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation, CC Docket No. 92-297, *et al.*

Dear Mr. Caton:

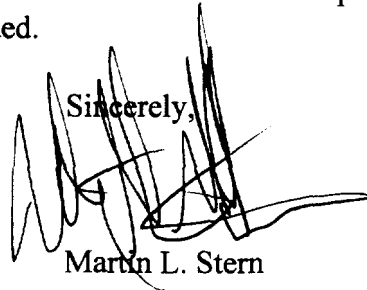
Pursuant to 47 C.F.R. § 1.1206(a)(2), WebCel Communications, Inc. ("WebCel") is filing with the Secretary an original and one copy of this notice of ex parte presentations in the above-captioned proceeding.

On November 5, 1997, David Mallof of WebCel, Glenn Manishin of Blumenfeld & Cohen, and Mary Jo Manning of Hill & Knowlton met with Commissioner Susan Ness and David Siddall of Commissioner Ness' office. On November 6, 1997, David Mallof of WebCel and I met with Peter Tenhula of Commissioner Michael Powell's office. Also on November 6, David Mallof, Glenn Manishin and I met with Ari Fitzgerald of Chairman William Kennard's office and Karen Gulick of Commissioner Gloria Tristani's office. On November 7, 1997, David Mallof, Glenn Manishin and I met with Steve Kaminer of Commissioner Harold Furchtgott-Roth's office. Also present at the meetings with Mr. Fitzgerald, Ms. Gulick and Mr. Kaminer was Mary McDermott, Vice President, Legal & Regulatory Affairs of United States Telephone Association (USTA).

At these meetings we discussed WebCel's views on the capital market conditions for LMDS designated entities ("DEs") and the LMDS auction date, as set forth more fully in the Joint Application for Review of the September 25, 1997 Public Notice setting the LMDS auction date, to which WebCel is a party. In particular, we suggested that the LMDS auction

Mr. William Caton  
November 7, 1997  
Page 2

date be moved back 60 days in light of the Commission's elimination of installment payments for LMDS DEs in its September 12, 1997 order on reconsideration. Copies of the enclosed letters and Joint Application were also provided.

Sincerely,  
  
Martin L. Stern

cc: Commissioner Susan Ness  
Ari Fitzgerald, Esq.  
David Siddall, Esq.  
Karen Gulick, Esq.  
Steve Kaminer, Esq.  
Peter Tenhula, Esq.

Attachments

MLS/jkl



**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21, 25	)	CC Docket No. 92-297
Of the Commission's Rules to Redesignate	)	
The 27.5-29.5 GHz Frequency Bands, To	)	
Reallocate the 29.5-30.0 GHz Frequency	)	
Band, To Establish Rules and Policies for	)	
Local Multipoint Distribution Service	)	
And for Fixed Satellite Services	)	
	)	
Application for Review of the Wireless	)	
Bureau's September 25, 1997 Public Notice	)	

**RECEIVED**

**OCT 23 1997**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

TO THE COMMISSION:

**JOINT APPLICATION FOR REVIEW**

WebCel Communications, Inc. ("WebCel"), LBC Communications, Inc., ("LBC") and Zip Communications, Inc. ("Zip"), (together, "Joint Applicants") by their attorneys and pursuant to 47 U.S.C. § 155(c)(4) and Section 1.115 of the Commission's Rules, 47 C.F.R. §1.115, hereby seek Commission Review of the September 25, 1997 Public Notice in this docket,<sup>1</sup> issued under delegated authority by the Wireless Telecommunications Bureau, setting December 10, 1997 as the date for commencement of the Local Multipoint Distribution Service ("LMDS") auction as well as establishing all relevant pre-auction deadlines.

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<sup>1</sup> *Auction of Local Multipoint Distribution Service*, Public Notice (DA-97-2081) (rel. Sept. 25, 1997) ("Auction Notice").

## BACKGROUND

For most of the four years, three NPRMs, and two orders preceding the Commission's *Second Order on Reconsideration* in this docket,<sup>2</sup> installment payments were proposed as a central component of the Commission's effort to "further the Congressional mandate to provide [auction] opportunities for designated entities."<sup>3</sup> On March 13 of this year the Commission released its *Second Report & Order* in this docket<sup>4</sup> adopting installment payments for small businesses bidding for LMDS licenses. It did so "[i]n order to promote the innovation that small businesses can bring to the development of LMDS."<sup>5</sup>

On September 12, the Commission released the *Second Order on Reconsideration*, which eliminated installment payments as a designated entity preference for LMDS. On September 25, the Wireless Telecommunications Bureau gave official notice of commencement of the LMDS auction on December 10, and set November 17 as the date for filing short form applications by those intending to bid.<sup>6</sup>

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<sup>2</sup> *Second Order on Reconsideration*, Rulemaking to Amend Parts 1, 2, 21, 25 of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Bands, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services (CC Docket No. 92-297) (rel. Sept. 12, 1997), 62 Fed. Reg. 48786 (Sept. 17, 1997) ("*Second Order on Reconsideration*").

<sup>3</sup> *The FCC Report to Congress on Spectrum Auctions*, FCC Wireless Telecommunications Bureau at 27 (rel. Oct. 9, 1997).

<sup>4</sup> *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, to Amend Parts 1, 2, 21, 25 of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Bands, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services (CC Docket No. 92-297) (rel. Mar 13, 1997) ("*Second Report and Order*").

<sup>5</sup> *Id.* ¶ 348. Installment payments are based on the common sense economic principles that: (1) the introduction of new entrants, including small businesses, into the traditionally closed local telecommunications services industries provides a pro-competitive effect of significant value to consumers, (2) the cost-of-capital to DEs is significantly higher than for larger companies, (3) DEs face access-to-capital challenges that larger companies do not, and (4) the purchase of any asset should be financed over the course of its useful life. The Commission used installment payments in six previous auctions, including PCS, IVDS, MDS, 900 MHz SMR and the broadband PCS C and F-blocks. By its own account, installment payment plans, coupled with bidding credits, "have resulted in new opportunities for small businesses to offer spectrum-based services" and are a "useful tool for small businesses to access capital. *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, WT Docket No. 97-82, ¶ 34 (rel. Feb. 28, 1997).

<sup>6</sup> *Auction Notice* at 1, 9.

## DISCUSSION

In its September 25 *Auction Notice*, the Wireless Bureau set a date for commencement of the LMDS auction barely 90 days from the Commission's order on reconsideration eliminating installment payments. The deadline for Form 175s, in which bidders are required to disclose, *inter alia*, their affiliates, controlling principles and gross revenues,<sup>7</sup> is barely two months after issuance of the reconsideration order.

Joint Applicants have long supported an early date for an LMDS auction,<sup>8</sup> and continue to support commencing the auction at the earliest reasonable time. However, the Commission's sudden elimination of installment payments on September 12 has fundamentally altered the amount of capital designated entities ("DEs") need to raise prior to the commencement of the auction in order to participate meaningfully. Even with the addition of a new Very Small Business category and an increased bidding credit of 45%,<sup>9</sup> the elimination of installment payments increases by nearly four-fold the amount that Very Small Business DEs will be required to pay the Commission upon issuance of LMDS licenses.<sup>10</sup> Thus, while previously DEs could largely focus their initial financing plans on funding working capital and system buildout, with the elimination of installment payments, DEs now must scramble to factor-in additional

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<sup>7</sup> 47 C.F.R. § 101.1109.

<sup>8</sup> See, e.g. Opposition and Comments by Zip Communications on Petition for Reconsideration, CC Docket 92-97 at 2 (July 2, 1997).

<sup>9</sup> See *Second Order on Reconsideration* at ¶ 20.

<sup>10</sup> A simple example demonstrates the new amounts that must be raised by DEs: Prior to the Commission's *Second Order on Reconsideration*, for each \$100 bid, a successful DE would actually owe \$75 (due to the 25% bidding credit). Disregarding upfront payment, which is the same in both cases, the DE would be required to raise and deliver immediately to the Commission only its 20% down payment, or \$15 for each dollar bid until the first installment payment was due. After the elimination of installment payments, for each \$100 bid, discounted by the new higher 45% bidding credit, a DE will have to pay \$55 upon issuance of the license, or almost four times the amount that would have previously been due.

financing for this four-times increase in the amount due the Commission upon issuance of the licenses.

In the *Second Report and Order*, the Commission established substantial penalties for default on the balance due to the Commission for LMDS licenses.<sup>11</sup> As the Commission explained in the *Competitive Bidding Second Report and Order*, imposing default penalties will ensure that potential bidders will “make sure of their qualifications and financial capabilities before the auction.”<sup>12</sup>

Unlike large bidders--who have existing lines of credit, the ability to float commercial paper or to obtain bridge financing--DEs, as the Commission has repeatedly recognized, face significant access-to-capital barriers, which impede their ability to arrange the additional, substantial financing required by the September 12 elimination of installment payments. Thus, the time-frame between the auction and the elimination of installment payments is simply unreasonably short, and will hamper the ability of designated entities to meet the Commission's expectation that bidders “make sure of their . . . financial capabilities” to pay for the balance due on the licenses won at auction and Congress' goal of small businesses providing meaningful competition in the provision of new telecommunications services.

Accordingly, in order to allow DEs a reasonable period of time to adjust their financing plans and capital structure, Joint Applicants respectfully ask that the Commission, consistent with its admonishment in the *Competitive Bidding Second Report and Order*, push back the start

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<sup>11</sup> *Second Report and Order* at ¶ 333.

<sup>12</sup> *Second Report and Order*, Implementation of Section 309(j) of the Communications Act-Competitive Bidding (PP Docket No. 93-253) (rel. Apr. 20, 1994), 9 FCC Rcd at 2382, (emphasis added) (*Competitive Bidding Second Report and Order*”).

date of the LMDS auction, as well as all pre-auction deadlines, by 60 days. Joint Applicants believe that this modest change will provide DEs with sufficient time to adjust to the substantial capital change brought about by elimination of installment payments, without unreasonably delaying the auction and the resulting introduction of an important new source of competition to the public.

The Bureau's decision to schedule the LMDS auction less than 90 days after declaring an end to installment payments is also inconsistent with Congress' recent amendment to the Commission's auction authorization, which directs the Commission to "ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed . . . after issuance of bidding rules, to ensure that interested parties have a [sic] sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."<sup>13</sup> Congress explained that its purpose in adopting this provision was to "protect against future auctions that attract only a few participants because of insufficient time to gather the information that is necessary for a robust auction."<sup>14</sup> Here, the Bureau has directly jeopardized the possibility of a "robust auction" by giving DEs insufficient time to revise their capital structure due to the late elimination of installment payment financing.

In the end, by establishing an unreasonably early date for the auction relative to the elimination of installment payments, the Commission is doing precisely what Congress has directed it not to do--auction spectrum to under-funded bidders in a climate of uncertainty. For

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<sup>13</sup> 47 U.S.C. § 309(j)(3)(E) (*Emphasis added*).

<sup>14</sup> H.R. Rep. No. 105-149, 105th Cong., 2d Sess. at 567 (1997).

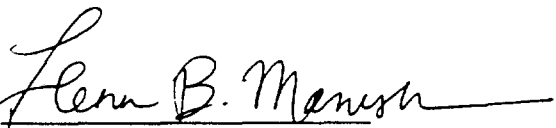
this reason as well, the Commission should delay the start of the auction and all relevant pre-auction deadlines by 60 days.

### CONCLUSION

For all these reasons, the Commission should delay the start of the LMDS auction and all relevant pre-auction deadlines by 60 days.

Respectfully submitted,

WEBCEL COMMUNICATIONS, INC.  
LBC COMMUNICATIONS, INC.  
ZIP COMMUNICATIONS, INC.

By:   
Glenn B. Manishin

Frank V. Paganelli  
Blumenfeld & Cohen - Technology Law Group  
1615 M Street, N.W., Suite 700  
Washington, D.C. 20036  
202.955.6300  
202.955.6460 fax

W. Kenneth Ferree  
Daniel S. Goldberg  
Goldberg, Godles, Wiener & Wright  
12290 Nineteenth Street, NW  
Washington, D.C. 20036  
202.429.4900  
202.429-4912 fax

*Counsel for LBC Communications, Inc.*

Lawrence R. Sidman  
Leo R. Fitzsimon  
Verner, Liipfert, Bernard, McPherson  
and Hand  
901 15th Street, N.W.  
Washington, D.C. 20005  
202.371.6206  
202.371.6279 fax

*Counsel for Zip Communications, Inc.*

Martin L. Stern  
Preston Gates Ellis & Rouvelas Meeds LLP  
1735 New York Avenue, N.W., Suite 500  
Washington, D.C. 20006  
202.662.8400  
202.331.1024 fax

*Counsel for WebCel Communications, Inc.*

Dated: October 23, 1997.



VENROCK ASSOCIATES

ROOM 5508  
30 ROCKEFELLER PLAZA  
NEW YORK, NY 10112  
(212) 649-5600  
FACSIMILE (212) 649-5788

SUITE A230  
755 PAGE MILL ROAD  
PALO ALTO, CA 94304  
(415) 493-3377  
FACSIMILE (415) 493-6443

WRITER'S DIRECT DIAL:

(212) 649-5787

October 29, 1997

Mr. Daniel Phythyon  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, NW  
Washington, DC 20554

Re: Recommendation to Extend the LMDS Auction Start by 60 Days

Dear Mr. Phythyon:

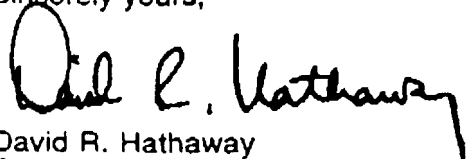
I am an investor in, and a board member of, several start-up telecommunications-related companies. My firm also serves as a consultant to senior management at numerous Fortune 50 information technology and telecommunications companies.

I write to request that you allow more time for the capital markets to absorb both the resolution of the C-Block issues and the new LMDS installment payment rules before you hold the LMDS auctions. I recommend you allow another 60 days for prospective investors like me and the bidding designated entity firms themselves to make adjustments to their business plans and capital raise program before going into the auction room.

In my mind there simply is not enough time for some of these firms with excellent business plans to execute modified capital raising programs and to revise their current business plan assumptions in light of your recent and profound September 12th decision to eliminate installment payments. While the increase in the bidding credit is a good partial step, the simple fact is that new entrants must now absolutely scramble to meet the increased capital requirements your decision imposes.

I am confident the government will see vibrant new entrants in the auction room if you allow a bit more time for your decisions to take hold. If not, the government will raise less money by having fewer bidders in the room, and those lost bidders are the great hope for competition in the local loop.

Sincerely yours,



David R. Hathaway  
General Partner

cc: Ms. Kathleen O'Brien-Ham, Auctions Division



**Teton Capital  
Management**

408 366 0581  
408 366 0583 fax  
11100 Regent Square  
Beverly Hills, CA 90210  
9/14/97

October 16, 1997

Mr. Daniel Phythyon  
Chief, Wireless Telecommunications Bureau  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Dear Mr. Phythyon:

Teton Capital Management is an early stage venture fund located in Cupertino, California focusing on information technology and communications opportunities. We have been following LMDS with great interest for some period of time. Your recent decision to change the critical financing terms and conditions has made a serious impact in our financing scenarios. Rather than building as we go and raising money over time based on results, we now must look at raising far more equity capital up front. This is a significantly different proposition for early stage investors. *Due to this significant change, we are writing to recommend that the FCC delay the LMDS auctions by 45-90 days to allow us and our prospective co-investors to re-evaluate the LMDS financing details on an orderly basis.* We need this time to properly address the new financial reality with potential co-investors and to modify the operating plans of our proposed company.

In particular, the total 10-year capitalization plan that we must approve in order to invest in a given "designated entity" company is based only in part on the government's financial preferences for entrepreneurial new entrants. Yet, the spectrum financing elements are critical in determining the mix of other financing for firms that intend to build out these LMDS networks. The critical links of vendor financing, high-yield debt, and the likely terms and conditions in a total capitalization plan context can only be "layered in" and finalized once the government's license payment policies are known.



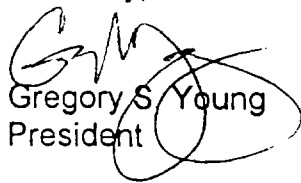
Teton Capital Management, like most early stage venture funds, invests in management teams with plans to build companies; we do not intend to speculate in spectrum. Since we are backing a team and an operating plan with a long-term payback, the firm's total capitalization plan is critical.

The FCC announced an auction date for LMDS on July 30<sup>th</sup>, but the critical details on government financing, so necessary for our decision making, were not final until September 12<sup>th</sup>, less than 90 days before the auctions are to begin. In the last four weeks, our prospective management team and co-investors have been working overtime to reconfigure their capitalization plans and to recalculate how their businesses will now be financed over a ten-year period. The withdrawal of government financing and the resulting increase in the required early stage equity capital to be used solely for spectrum payments is a major change.

There is very little time left for us to work out a rational and well-reasoned investment plan for the auction. We respectfully request you delay the auctions just long enough to allow orderly investment decision-making in light of your recent significant policy decisions on financing terms.

We would be glad to answer any questions you may have.

Sincerely,

  
Gregory S. Young  
President

# amsterdam pacific

LLC

PRIVATE INVESTMENT BANKERS

October 28, 1997

Mr. Daniel Phythyon  
Chief, Wireless Telecommunications Bureau  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Dear Mr. Phythyon:

I am writing to give you our firm's views on postponing the commencement date of the LMDS auctions.

As background, let me explain that Amsterdam Pacific is an investment bank dedicated entirely to the telecommunications and media sectors. Our firm has the leading, or one of the leading, arrangers of private equity placements for the wireless cable (2 GHz) industry since 1990. We began working with companies operating in the 28 GHz frequency band two years ago by arranging a private equity placement for the first commercial LMDS operating system in the world (Caracas VivaVision in Venezuela). Earlier this year we arranged a private equity placement for an LMDS equipment manufacturer in the U.S.

We have been following closely the FCC's steps in establishing the LMDS auction and since the spring have been in contact with approximately three dozen specialized telecommunications funds, a dozen companies and entrepreneurs aspiring to enter the auctions as well as all of the major equipment suppliers. These discussions give us a broad perspective to gauge the responsiveness to commit funding to support LMDS auction bidders.

The announcement at the end of July for the LMDS auction date left a short period for most telecommunications funds to find the management teams they would be comfortable backing, review or develop detailed operating business plans and negotiate investment agreements prior to November filing of Form 175. The short decision window for investments into largely unproven business became significantly more constraining when the FCC announced in early September that deferred payment would not be available. We have found that the telecommunication investment funds are further perplexed by uncertainty about whether telephone and cable companies will get a stay from the courts postponing the auction date and whether that would give an advantage to those companies. Finally, the uncertainty about whether foreign

Mr. Daniel Phythyon  
October 28, 1997  
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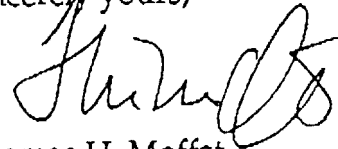
investors will be allowed to hold significant ownership after January 1, 1998 makes it difficult to assess the competition. All of these changes and uncertainties have had a severe impact on the ability of potential bidders to line up much backing in time for filing.

Based on our work with investors and potential bidders, we strongly recommend that the FCC delay the initial filing date for the LMDS auctions by two months. We believe the extra time would permit a significant additional amount of capital to be committed to back interested bidders with the probable result of raising larger total proceeds from the auction.

Please feel free to call me with any questions you may have. Thank you for considering our request.

With best wishes, I remain

Sincerely yours,



Thomas H. Moffet  
President

cc: Ms. Kathleen O'Brien-Ham  
Auctions Division

3096 TM/vw

# SBT SMALL BUSINESS IN TELECOMMUNICATIONS

1835 K Street, N.W., Suite 650, Washington, D.C. 20006

202/223-8728

October 16, 1997

Office of Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Request For Rescheduling of LMDS Auction (Auction 17)  
From December 10, 1997 to February 10, 1998  
Or, In the Alternative, Reestablishment of Installment Payments  
CC Docket No. 92-297

To: The Commissioners

On behalf of the Association members, including those wishing to participate in the upcoming LMDS Auction which is scheduled to be held on December 10, 1997, see, Commission's Public Notice entitled *Auction of Local Multipoint Distribution Service* (DA 97-2081) released September 25, 1997, SBT hereby requests that the auction date be rescheduled for February 10, 1998, to provide sufficient time for participants to adjust their financial planning to reflect the agency's elimination of installment payments. As the Commission knows and as is reflected in the separate statement of Commissioner Chong to the Second Order on Reconsideration, CC Docket No. 92-297 (released September 12, 1997), the elimination of installments payments will have a substantial impact on small businesses attempting to finance participation in the auction. This impact is reflected in small businesses, which have long positioned themselves for participation, having to reapproach lenders to adjust their finances.

Since the time of the Commission's announcement within the aforementioned Public Notice, SBT members have attempted quickly to readjust long standing financial commitments, however, the Commission's presently announced date of the auction is coming too fast to assure that small business will be able to accomplish the goal of reforming business plans. Therefore, to provide necessary assistance to small business, SBT requests that the Commission reconsider its scheduled date of December 10, 1997, revising that date to February 10, 1998. In the alternative, SBT hereby requests that the Commission reestablish the use of installment payments for small businesses participating in the LMDS auction.

SBT recognizes that the Commission has not had to endure the problems and pitfalls of small business financing. Whereas an 88-day period between the announcement and the holding of the auction might be sufficient for large corporations capable of self-financing, the time period is insufficient for small business needs, especially when a material element of previous financing, installment payments, has been suddenly eliminated.

The grant of the instant request will also conform with the Commission's duties in accord with newly adopted 47 U.S.C. §309(j)(3)(E), wherein Congress specifically required the agency to provide entities with sufficient time to evaluate and arrange financing following adoption of final auction rules. SBT does not believe that the announced 88-day period is sufficient for the purposes of meeting the mandate contained within Section 309(j)(3)(E), in view of the agency's elimination of installment payments. In fact, for purposes of conformance with the statutory language, the period between the announcement of final auction rules commenced on September 25, 1997 with the Commission's Public Notice entitled *Auction of Local Multipoint Distribution Service* (DA 97-2081), thereby creating a mere 75-day period for rearranging finances for the purpose of participation.

It should be noted that SBT does not seek to set aside the auction or disturb the Commission's chosen methodology for performance of the auction. The delay suffered in this proceeding has been substantial already. However, the language of the relevant statute and the effect of the Commission's elimination of installment payments necessitates the Commission's providing some relief for small business and to assist the Commission in fulfilling its obligations to take those actions which are necessary to disseminate licenses among designated entities. Since the Commission's elimination of installment payments shall have the greatest adverse impact on that class of persons, grant of the requested relief will also assist the Commission in conforming with its duties under 47 U.S.C. §309(j)(4).

If the Commission believes that the auction should continue to be scheduled for December 10, 1997, SBT respectfully requests that the agency reestablish the installment payments as an alternative method of financing participation. SBT recommends that the Commission allow participants to chose between higher bidding credits or installment payments as each eligible participant's method of payment. In this manner, the agency will not disturb any newly rearranged financial plans made by small businesses who have been successful in adjusting their financing following the Commission's announced elimination of installment payments; while providing to persons who do not have the capacity to alter financing structures in the brief period before auction, an opportunity to participate under pre-existing financial arrangements.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

By: 

Robert H. Schwaninger, Jr.

Its General Counsel  
Brown and Schwaninger  
1835 K Street, N.W.  
Suite 650  
Washington, D.C. 20006  
202/223-8837